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Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 92

HUBERT N. SELBY, JR.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KUPFER & LEVINE,
Proctors for Petitioner.

JACOB RASSNER,
THOMAS F. FRAWLEY,
of Counsel.

INDEX TO BRIEF

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Reasons for Granting the Writ	2
Statement of the Case	2
History	2
Argument	3
Conclusion	10
APPENDIX:	
Opinion of United States Court of Appeals for the Second Circuit	11
Judgment	15

Table of Cases Cited

Byrd v. Blue Ridge Rural Electric Co-operative, 356 U. S. 525, 78 S. Ct. 893	4
Kelley v. Everglades Drainage District, 319 U. S. 415, 63 S. Ct. 114	4
Kweskin v. Finkelstein, 7 C. C. A. 223, Fed. 2d 677	4
Major Appliance Co. v. Gibson Refrigerator Sales Corp., 5 C. C. A. 254, Fed. 2d 497	4
Mayo v. Lakeland Highlands Canning Company, 309 U. S. 310, 60 S. Ct. 517	4, 5
U. S. v. Causby, 328 U. S. 256, 268, 66 S. Ct. 1062	4

Statute Cited

28 U. S. C. 1254(1)	1

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on March 6, 1959.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York, dated May 9, 1958, is reported at 161 Fed. Supp. 689.

The opinion of the Court of Appeals in this case (Appendix, pp. 11-14) is not reported as yet.

Jurisdiction

The judgment of the Court of Appeals was entered on March 6, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Is the exercise of the power of supervision by the Supreme Court of the United States under Rule 19 of this Court required in the furtherance of justice to declare mandatory the provisions of Admiralty Rule 46½, where a Trial Court and a Circuit Court of Appeals have refused to make any findings of fact or conclusions of law in a seaman's personal injury action, particularly where neither Court has passed upon the most material and basic issues involved?

Reasons for Granting the Writ

1. The Trial Court has refused to comply with Rule 46½ of the Admiralty Rules.

2. The United States Court of Appeals for the Second Circuit likewise has totally disregarded the provisions of Rule 46½. The Trial Court's decision was affirmed by the Court below on the opinion of the Trial Court, disregarding the fact that the Trial Court had failed to comply with the applicable law.

3. When a Trial Court fails to make a decision in accordance with the Rules of Admiralty, the decision by a Circuit Court of Appeals sustaining such a finding is such a radical departure from the established practice as to require the intervention of the United States Supreme Court to correct such abuse.

Statement of the Case

History

Petitioner was a youth, 17 years of age, whose lungs were completely destroyed by conditions prevalent aboard respondent's vessel, the S.S. "Rockland Victory", which was the direct and proximate cause of his injuries, as established by the uncontradicted testimony at the trial.

Petitioner instituted this admiralty action for personal injuries in the United States District Court for the Eastern District of New York to recover damages for a tubercular condition alleged to have resulted from the negligence of respondent and/or failure to furnish petitioner with a seaworthy vessel.

The respondent denied all allegations of negligence, unseaworthiness, proximate causation and damages.

The cause proceeded to trial and resulted in the libel being dismissed. Petitioner took an appeal from the judgment to the United States Court of Appeals for the Second Circuit and the judgment was affirmed.

Recovery was sought at the trial because of the negligence of the respondent and/or for failure to furnish the libelant with a seaworthy vessel on two grounds:

1. because the respondent failed to furnish petitioner with a safe place to work and because the ship was unseaworthy as operated and maintained by respondent, and,

2. because respondent negligently accepted for transportation and carried a shipload of sick and dying horses and compelled petitioner to live in close proximity to such sick and dying horses and their excreta and because respondent furnished petitioner with an unseaworthy cargo resulting in his becoming tubercular.

The Trial Court determined the first ground of negligence and unseaworthiness in favor of respondent but failed to make any finding or determination of any kind as to the second ground.

Argument

A seaman has been denied the opportunity to have his claim for personal injuries heard and determined by a Court of Admiralty and the United States Court of Appeals

for the Second Circuit by the arbitrary failure of each court to pass upon the material issues litigated at the trial.

(a) The Trial Court failed to pass upon a claim of negligence or unseaworthiness predicated upon the fact that sick and dying horses were accepted for transportation and carried on a vessel under conditions which required the petitioner to be in continuous close proximity to such sick, dying and dead horses and their excreta, resulting in his subsequent tuberculosis.

(b) The lower Court failed to pass upon

(1) such claim of negligence or unseaworthiness predicated upon such acceptance and transportation of such sick and dying horses; and

(2) the claim of petitioner that such respondent's negligent acts or such unseaworthy condition of such vessel was a competent producing cause of his tuberculosis.

The Trial Court and the United States Court of Appeals for the Second Circuit not having determined the most material and basic issues as required by Rule 46½ of the Admiralty Rules,[1] the judgment must be reversed.[2]

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[1] In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. When deemed necessary by the court of the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs.

[2] *Byrd v. Blue Ridge Rural Electric Co-operative*, 356 U. S. 525, 78 S. Ct. 893; *U. S. v. Causby*, 328 U. S. 256, 268, 66 S. Ct. 1062; *Kelley v. Everglades Drainage District*, 319 U. S. 415, 420, 422, 63 S. Ct. 1141; *Mayo v. Lakeland Highlands Canning Company*, 309 U. S. 310, 317, 60 S. Ct. 517, 520; *Kaeselkin v. Finkelstein*, 7 C. C. A. 223, Fed. 2d 677; *Major Appliance Co. v. Gibson Refrigerator Sales Corp.*, 5 C. C. A. 254, Fed. 2d 497.

"Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal."

Mayo v. *Lakeland Highlands Canning Company*, 309 U. S. 310, 317, 60 S. Ct. 517, 520.

The petitioner, age 17, signed on as an oiler on the S.S. Rockland Victory in January, 1946, New York City for a voyage to Houston, Texas, and then to Europe for the carriage of a cargo of horses.

Before signing on, he was given a physical examination by a Dr. Dugdale in behalf of respondent and was thereafter accepted as a member of the crew.

The log under date of March 14th shows:

"*Total number of dead horses, 132. Mortality rate 16⅔ per cent*" (R. 283).

Of these 792 animals, the log proves that only 313 were loaded in the holds (R. 270).

The log proves that on February 19th one dead horse was removed from two lower 'tweendeck and another one from 'tweendeck.

"Horses died of pneumonia" (R. 272).

The entries continue:

February 20, "four horses dead, died of pneumonia" (R. 273).

February 21, "five horses dead, died of pneumonia" (R. 273).

February 22 (still at Houston) "eleven horses dead, died of pneumonia" (R. 272-273).

February 23 (still at Houston), "six horses dead, died of pneumonia" (R. 273).

February 23, "swabbed down decks" (R. 274).

February 24th log discloses that Anderson live stock attendant became ill with chills, slight pains in various parts of body and that radiogram was sent seeking medical advice as to his illness (R. 274) also—"removing dead horses" (R. 276).

February 26th "seven dead horses" "discharging dead horses" (R. 277).

February 27th "removing dead horses" "five dead horses" (R. 277).

February 28th "sixteen dead horses" "discharging dead horses" (R. 278).

March 1st, "seven dead horses discharged".

March 2nd "seven dead horses discharged" (R. 278).

March 3rd "three dead horses discharged" (R. 278).

March 4th "six dead horses discharged" (R. 279).

March 5th "four dead horses discharged" (R. 279).

March 6th "eight dead horses discharged" (R. 279).

March 7th "three dead horses discharged" (R. 279).

March 8th "eight dead horses discharged" (R. 279).

March 9th "one dead horse discharged" "three men discharging dead horses" (R. 280).

March 10th "one dead horse discharged" "three men discharging dead horses" (R. 280).

March 11th "two dead horses discharged" (R. 280).

March 12th "three dead horses discharged" (R. 280).

March 13th "four dead horses discharged" "horses discharged 471, four dead" (R. 280) also "one mule colt" (R. 281), "at 1800, a further discharge of 403 horses in which three were dead" (R. 281).

March 14th "finished discharging horses. Horses dead, three" (R. 283).

During the voyage the average death rate was over 5 horses a day a total of 104 horses for the 19 day voyage with the high figure of *sixteen dead horses on February 28th.*

Petitioner was compelled to live in close proximity to the filth, dirt, sickness, disease and death of these horses aboard the vessel. The mucus and phlegm from the sick horses even before leaving Houston was sprayed upon and stuck to his body and face. Sick and dying and dead horses were permitted to remain on deck until they were thrown overboard. The manure, blood and urine were permitted to pile up on the deck and in the holds and the stench was continuous, nauseating, increased at all times by the dying horses.

These conditions prevented him from eating and sleeping properly, he was upset emotionally, all of which tended to and did lower his physical stamina and resistance.

He was well when he left New York, but because of his inability to properly nourish his body, the dormant tubercular bacilli gained the ascendency with the resultant tuberculosis.

The ROCKLAND VICTORY sailed to Trieste. It returned to Houston and petitioner sailed again on the ROCKLAND VICTORY for Greece on April 25th. The ship carried some 814 mules on this second trip of which only ten died.

Petitioner returned home in June and went to sea again in August, 1946. After three days on this last trip he started hemorrhaging and spitting blood. The vessel arrived in Bremen on Labor Day and he was then taken to the Army Hospital and ultimately transferred to the Army Hospital at Bremerhaven. At the end of two weeks he was put in a hospital there and arrived in New York on November 5th and was taken to the U. S. Public Health Service Hospital at Staten Island and a few hours later was transferred to Neponsit Hospital [illegible]ercular Wing.

It was conceded that the first diagnosis of tuberculosis was in Germany.

X-rays were taken of the petitioner on November 7th, 1946, and the Government Hospital record disclosed that there was an involvement of both lungs.

X-rays were taken of libelant's lungs on April 24, 1945 by the U. S. Maritime Commission and the records of the Commission state that such x-rays were negative.

This likewise is the opinion of Dr. Lang who interpreted them, by Dr. Zismore, who took them and by Dr. Weingarten, who examined them.

All of these doctors were called as witnesses by petitioner and all of them were or had been connected with the Government Health Service at U. S. Public Health Service Hospital, Staten Island.

Dr. Lang, connected with the hospital at the time of the trial testified that the x-ray taken of libelant's lungs as of November 6, 1946, two days after his return from Germany, showed that both lungs were then involved and that the conditions then disclosed indicated that it had taken from six to nine months to develop.

Dr. Lang testified that tuberculosis could be caused by a lowered resistance because of living conditions.

Dr. Zismore and Dr. Weingarten both testified that it was their opinion that the conditions on the ship, the sick and dying horses and the resultant excreta, could and did cause the tubercular condition of libelant.

The Trial Court did not pass upon the litigated issue as to whether defendant was negligent in accepting and transporting these sick and dying horses with their sneezing, coughing, flying of phlegm and other excreta. Neither did it pass upon the issue of the unseaworthiness of the ship because of such conditions during such voyage.

The opinion states as to damages:

> "He has not demonstrated by the weight of credible evidence that the Rockland was not operated as a transport vessel carrying 700 or more horses, so that a member of her crew was not provided with a reasonably safe place to work, whereby he was caused to become a victim of tuberculosis."

By this statement the Trial Court avoided the responsibility of determining whether the sick and dying horses and their excreta was a competent producing cause of libelant's tuberculosis.

At the end of the trial there is finding of fact and no statement of any kind in the opinion that passed upon either the responsibility of respondent to the petitioner for its acceptance as cargo and transportation or whether such cargo of such sick and dying horses resulted in his tuberculosis.

The opinion speaks for itself. It requires no further explanation.

The decision of the United States Court of Appeals for the Second Circuit is nothing more than review of factual claims with the statement that the decision of the Trial Court that the condition of the ship itself was not seaworthy was not clearly erroneous.

It does not pass upon the negligent acceptance of the cargo of sick and dying horses nor does it discuss whether the ship was unseaworthy because of its such cargo.

It does not pass at all upon the issue of damages.

The decision that there was no negligence and no unseaworthiness was a finality in itself so that any discussion as to damages was unnecessary and mere surplusage.

But it cannot be asserted by respondent that such opinion meets the material issues involved. On the contrary it evades them.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
JACOB RASSNER
and KUPFER & LEVINE,
Proctors for Petitioner.

JACOB RASSNER,
THOMAS F. FRAWLEY,
of Counsel.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 450—October Term, 1958

(Argued February 6, 1959. Decided March 6, 1959.)

Docket No. 25251

HUBERT N. SELBY, JR.,

Libelant-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

CLARK, *Chief Judge.*

MADDEN, *Judge, United States Court of Claims,** and HINCKS, *Circuit Judge.*

Appeal from the United States District Court for the Eastern District of New York, Mortimer W. Byers, *Chief Judge.*

Hubert N. Selby, Jr., appeals from a decree dismissing his libel. D. C. E. D. N. Y., 161 F. Supp. 689.

* Sitting by designation pursuant to the provisions of 28 U. S. C. § 291(a).

THOMAS F. FRAWLEY, New York City (Kupfer & Levine and Jacob Rassner, New York City, on the brief), *for libelant-appellant.*

EDWARD J. BEHRENS, of Gay & Behrens, New York City (Cornelius W. Wickersham, Jr., U. S. Atty., E. D. N. Y., Brooklyn, N. Y., on the brief), *for respondent-appellee.*

MADDEN, *Judge:*

The libelant-appellant appeals from a decree of the United States District Court for the Eastern District of New York, sitting in Admiralty, dismissing his libel.

The libelant sought, in the District Court, to recover damages under the Jones Act, 41 Stat. 1007, 46 U. S. C. 688, because of having been "exposed to contagion and illness" while serving as an oiler on the S.S. ROCKLAND VICTORY, a ship owned, managed, operated and controlled by the respondent, the United States.

The libelant, then eighteen years old, signed on as an oiler on the ROCKLAND in January of 1946, at the port of New York, for a voyage to begin at Houston, Texas for the carriage of a cargo of horses to Italy. The horses were put on board at Houston. The libelant testified that some of the horses had respiratory sicknesses; that several of them died before the ship left the port of Houston; that many others died at sea; that the condition of the ship was so filthy and nauseating because the horses' stalls were not cleaned and the dead horses were not promptly thrown overboard, and because the live horses coughed, sneezed and discharged flying sputum into the air, that the libelant lost his appetite and was unable to nourish his body. The libelant claims that because of his undernourishment and lowered resistance to disease, tuberculosis germs which are

dormant in the bodies of most persons were able to gain the ascendency and disable him.

The horses were carried to Trieste, Italy, the ship returned to Houston and the crew was paid off on April 5. The libelant signed on the same ship for a second livestock carrying voyage on April 22. The ship left Houston April 25, carrying a cargo of mules and mares to Greece, from whence the ship returned to Norfolk, Virginia, on June 8. After six weeks at home, during which the libelant was treated for a mouth-condition, he signed on the KYSKA, a ship of the Waterman Steamship Company, for a voyage to Bremen, Germany. After three days at sea on the KYSKA the libelant began to hemorrhage and spit blood. At Bremerhaven he was transferred to an Army hospital. After two weeks he was put aboard a hospital ship and carried to New York, where he arrived on November 5, 1946, and was placed in the Tubercular Wing of Nepohsit Hospital, seriously afflicted with tuberculosis, which has greatly impaired his earning ability.

The District Judge held, 161 F. Supp. 689, that the libelant had not sustained his burden of proof that the S.S. ROCKLAND was unseaworthy or that it was negligently operated and thereby caused the libelant's harm. There was no evidence of unseaworthiness of the ship, as such. The only respect in which the ship was claimed to have been negligently maintained, was that, the libelant testified, the handlers of the horses were not required to daily clean the stalls, nor to promptly throw the dead animals overboard. The Judge concluded, from entries made in the ship's log, from the fact that no other member of the crew suffered ill effect from the voyage, and from the fact that the libelant signed on for the second voyage on the same ship with another cargo of animals, that the libelant's testimony as to the conditions on the ship was greatly exaggerated, and that in fact there was no negligence in the operation of the ship, in the respect in which the libelant asserts that it was negligently operated.

The libelant had the burden of proof. *Seaboard Sand & Gravel Corp.* v. *American Stevedores, Inc.*, 151 F. 2d 846 (C. A. 2). As to "the reluctance of the appellate court to disturb what the trial court with its better opportunities had determined," as applied to a suit in Admiralty, see *Petterson Lighterage and Towing Corp.* v. *New York Central R. Co.*, 126 F. 2d 992 (C. A. 2). See also *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. 2d 226, 230.

The findings of the District Court were not clearly erroneous, and its judgment is

Affirmed.

Judgment

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of March, one thousand nine hundred and fifty-nine.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. J. WARREN MADDEN,
Judge, United States Court of Claims.

HON. CARROLL C. HINCKS,
Circuit Judge.

HUBERT N. SELBY, JR.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.